law by Edward Renie, November 12, 1888, commuted to cash June 12, 1890.

* * * * * * *

[Description of twenty-six entries and filings omitted.]

Those lands are all within the indemnity limits of the grant to said company, the withdrawal for which was revoked August 13, 1887 (see Atlantic and Pacific R. R. Co., 6 L. D., 84, and note at foot of decision).

The company applied to select these tracts November 10, 1891, but, subsequent to the revocation of the order of withdrawal, and prior to the company's application to select, they had been entered and settled upon as above set forth. They were, therefore, not subject to the company's right of selection, and your judgment is correct. (See page 91 of case above cited; also Central Pacific R. R. Co. *v.* Dole, 8 L. D., 355.)

MINERAL LAND—PLACER CLAIM—STONE LANDS.

VAN DOREN *v.* PLESTED.

Land containing a deposit of sandstone of a superior quality for building and ornamental purposes, and valuable only as a stone quarry, may be entered as a placer claim under the general mining laws.

In the disposition of cases before the local office the register and receiver should give the testimony a thorough consideration, and set forth briefly in their opinion the facts on which their judgment is based.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1893.

The land involved in this appeal is the NE. ¼, Sec. 14, Tp. 33 S., R. 64 W., Pueblo, Colorado, land district.

This tract was formerly covered by the homestead entry of one Crescencio Montoya, and the same was contested by W. A. Van Doren and William Plested. The former filed his affidavit April 1, 1888, alleging fraud in said entry, and the latter averring failure to comply with the law in the matter of residence and cultivation on the part of the entryman, and that the land was more valuable for a stone quarry than for agricultural purposes. This affidavit of contest is alleged to have been filed in the latter part of April, 1888.

A hearing was had, and the case finally decided by the Department September 26, 1889 (L. and R., 186, p. 362), wherein the concurring decisions of the register and receiver and your office were affirmed, holding said entry for cancellation because of failure to comply with the homestead law, but it was held that:

> The question as to whether the land is mineral and subject to entry under the mineral laws, as held by your office, is not passed upon in this decision. Neither of the contestants appeal from your office decision. (In deciding the case you found the tract "to be mineral in character and subject to entry under the mineral laws.")

Should they, or either of them, make application to enter the land, the question as to its character and the preference right of entry as between them will then be presented for determination.

The local officers report that "all parties were notified of this decision by registered mail October 15, 1889."

It is stated in this same report that:

The records of this office further show that a petition of Van Doren's was filed prior to the decision of the local officers, praying that in case the land was decided to be mineral, he, because of having first filed application to contest, be allowed a preference right to enter twenty acres of the tract under the mineral laws. This was dismissed by the Hon. Commissioner, as no preference right to enter analogous to that under the pre-emption, is known under the mineral laws.

I do not find in the files, however, any papers referring to this; hence, I can not give the date.

On September 28, 1889, William Plested filed an application to enter the tract as placer mining ground, the same having been located as such by eight different persons, in April, 1888, and transferred to the applicant. The application was received and filed in the local office, and publication ordered October 14 following, as required under the rules.

On December 14, 1889, Van Doren filed a protest against Plested's application, alleging that he is the person who contested Montoya's entry; that he claims the right to enter said land as a homestead; that the land is more valuable for agricultural purposes than any other; that it is not mineral land; that Plested's application is not made in good faith, but for the purpose of defrauding affiant; that the various placer locations were not made in good faith, and he asks that a hearing may be ordered to determine the character of the land. Accompanying this protest was his application to enter the land as a homestead.

It is stated that on the same day Frederick Archibald presented his pre-emption declaratory statement for the tract, which was rejected, but on appeal he was permitted to intervene; also that "on January 6, 1890, said Plested filed his homestead application for said tract, alleging settlement October 12, 1889; this application was filed to secure title to the land, should it be adjudged non-mineral." I do not find any of the papers in connection with either of those matters in the files.

A hearing under the Van Doren protest was ordered, and, after service on the defendant, he filed a motion to dismiss the protest, on the ground that the issue involved had been adjudicated in the case of Van Doren *v.* Montoya. The local officers sustained the motion, but on appeal it is stated that you overruled the same and ordered the hearing to proceed.

By stipulation of attorneys, the testimony was taken before the clerk of the district court, at Trinidad, and transmitted to the local office. In rendering their decision the register and receiver, after reciting the

facts as shown by the records of their office, state that owing to insufficient clerical force, they are compelled to do the clerical work, and—

> It has, therefore, been found impossible for the officers personally to give the time necessary to examine the testimony to determine the preponderance of reliable evidence upon every proposition advanced by one and denied by the other or to examine the decisions to determine the weight of authority upon all the questions involved.
>
> Believing, however, that delay is practically a denial of justice, we decide in favor of the contestee, upon the arguments of counsel, together with memoranda of testimony by the contest clerk, and recommend that mineral application No. 251 of Wm. Plested be passed to patent.

Van Doren appealed, and you, by letter of August 11, 1891, reversed their decision, and held "that said tract is non-mineral land," that "it is simply a quarry of stone for general building purposes, and as such not subject to entry under the mineral land laws." You also decided that:

> Nothing herein is to be construed as an award of the land to either Van Doren, Plested, or Archibald, under the agricultural laws. Their respective rights will have to be determined hereafter in the usual manner.

Plested appealed, assigning as error, substantially, that your decision is against the law.

The only question presented by the record is as to the character of the land, and the appeal does not question your findings of fact, but simply claims that you erred in deciding that the case of Conlin *v.* Kelly (12 L. D., 1) should control the judgment in this.

The case at bar is almost exactly similar in all essential features to that of McGlenn *v.* Wienbroeer (15 L. D., 370). The lands join; the testimony as to its character is substantially the same, in some instances the same witnesses testified in both cases. In that case a distinction was drawn between it and Conlin *v.* Kelly, *supra*, and it was decided that the rule in the latter could not control in this. Hence, it is only necessary to say that it was error to apply the doctrine in Conlin *v.* Kelly to this character of cases.

The attempt of the protestant to show that the land is valuable for agricultural purposes was, in my opinion, far from convincing. It is shown that the land is on a mesa, rising abruptly from the Purgatoire river to an altitude of about four hundred and eighty feet above the river, and that the elevation of the mesa above the so-called low lands of the tract is from one hundred and fifty to two hundred and fifty feet. The character of the land on each mineral location is said to be very steep bluffs at the edge of the mesa from ten to sixty feet in height, below which is a talus of débris extending to the low land. The perpendicular bluffs are composed of massive sandstone, in stratified layers, from fifty to sixty feet in thickness. The talus, upon which it is claimed vegetation grows, is composed of earth with stones of various sizes, chiefly, however, of decomposed sandstone lying upon shale. The estimate of the various witnesses as to the amount of land that could,

under favorable circumstances, be cultivated varies from two acres to sixty, but I think a fair preponderance of the evidence shows that it would not exceed eight. None of it has ever been cultivated and certain it is that it can not be without irrigation, and I am satisfied from the testimony that it is a practical impossibility to ever successfully convey water upon the tract. And I think it is proved, by witnesses who have been engaged in the stock business in that vicinity for from ten to thirty years, that it possesses no value as a stock range in its present condition, and, granting that water could be found on or conveyed to it for stock to drink, I think the area that could be grazed is so small as to be wholly profitless.

On the other hand, it is indisputably shown that the sandstone is of a superior quality for building and ornamental purposes, and as such is extensively utilized, and that the land as a matter of fact is only valuable for a stone quarry. Therefore, following the rule announced in McGlenn *v.* Wienbroeer, *supra*, it was error in not permitting it to be patented as a placer.

Your judgment is therefore reversed.

I can not close this case without calling your attention to the lax manner in which the local officers arrived at their judgment. It matters not that they may, by accident or chance, have arrived at a proper conclusion in deciding the case. The fact that they admit, in the face of their peremptory instructions, that they did not examine the testimony to ascertain the facts disclosed is a practice too reprehensible in its nature to be passed over in silence.

Rule 37 (Rules of Practice) says:

> The register and receiver will be careful to reach, if possible, the exact condition and status of the land involved by any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest.

This rule applies specifically to trials had before them. Subdivision 4 of rule 35, in regard to oral testimony taken before other officers, as in this case, provides:

> On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves.

Rule 51 prescribes:

> Upon the termination of a contest, the register and receiver will render a joint report and opinion in the case, etc.

These rules clearly and unmistakably require the local officers to examine the testimony in all cases where it is necessary, in order that they may render an intelligent judgment on the facts disclosed. They are required to write an opinion in the case. To enable one to do this certainly requires a familiarity with the evidence, and to render a judgment without such a knowledge is a travesty upon justice. The manifest injustice of such a practice is too patent for discussion. In matters of fact within their jurisdiction, the judgment of the register and

receiver is binding upon the parties subject to attack only by appeal. They should therefore give the testimony in all cases such thorough consideration as will aid them in arriving at a conclusion, and the facts upon which they base their judgment should be briefly set out in their opinion. This is for the double purpose of enabling the appellant to intelligently prosecute his appeal and the appellate tribunal to have the benefit of the opinion of the examining court. It has become a well established rule in this Department that the concurring decisions of the local officers and the Commissioner on questions of fact shall prevail, or, at least, have great weight, in the consideration of all appeals in this office. If the practice of the Pueblo office, as quoted above, were to prevail in the local offices, it would destroy the efficiency of this rule.

HOMESTEAD—SECOND ENTRY.

JOHN FRUNDT.

The amendment of section 2289 R. S., by section 5, act of March 3, 1891, does operate to confer the right to make a second homestead entry upon one who had theretofore entered a quarter section of public land, under the homestead laws

First Assistant Secretary Sims, to the Commissioner of the General Land Office, June 8, 1893.

John Frundt has appealed from your decision of January 7, 1892, sustaining the action of the local officers in rejecting his application to make homestead entry of the SE. ¼ of Sec. 6, T. 129, R. 49, Fargo land district, North Dakota.

The rejection was based upon the facts, (1) that he had before perfected a homestead entry; (2) that the tract he applied to enter is embraced in the prior homestead entry of one Wiley Marsh.

His appeal is based upon the contention that the 5th section of the act of March 3, 1891, "To repeal timber-culture laws, and for other purposes," so amended section 2289 of the Revised Statutes as to permit him, notwithstanding he has perfected one homestead entry, to make another.

An examination of said section, as amended, shows that it confers no rights in addition to those granted by the original section. The only provision added by the amendment is:

> But no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law.

This is a limitation of the homestead right, and not an enlargement of it. Some persons who might have made homestead entry under the original section are disqualified from so doing under the section as amended; but nobody who was disqualified under the original section, has such disqualification removed by the amended section. By both